78-297

IN THE

Supreme Court of the United States.

October Term, 1978.

MANCHESTER NEWS COMPANY, INC.,
APPELLANT,
v.
STATE OF NEW HAMPSHIRE,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE.

Jurisdictional Statement.

W. MICHAEL DUNN, ESQUIRE,
DOROTHY M. BICKFORD, ESQUIRE,
SHEEHAN, PHINNEY, BASS & GREEN, P.A.,
1000 Elm Street,
Manchester, New Hampshire.
(603) 668-0300
Attorneys for the Appellant.

ADDISON C. GETCHELL & SON, INC., THE LAWYERS' PRINTER, BOSTON

Table of Contents.

Table of Authorities Cited.

CASES.

CONSTITUTIONAL PROVISIONS AND STATUTES.

MISCELLANEOUS.

IN THE

Supreme Court of the United States.

October Term, 1978.

MANCHESTER NEWS COMPANY, INC.,
APPELLANT,
v.
STATE OF NEW HAMPSHIRE,
APPELLEE,

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE.

Jurisdictional Statement.

The Appellant, Manchester News Company, Inc., appeals from a decision of the Supreme Court of New Hampshire filed on April 25, 1978. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial federal questions are presented.

Opinions Below.

The opinion of the Supreme Court of New Hampshire is not officially reported and appears herein as Appendix A, pages 17-25.

Jurisdiction.

The Decision and Order of the Supreme Court of New Hampshire was filed on April 25, 1978. The Appellant filed a Motion for Rehearing on May 5, 1978 with the New Hampshire Supreme Court. The Motion for Rehearing, attached as Appendix B, was denied on May 24, 1978. The Notices of Appeal were filed on August 15, 1978 with the New Hampshire Supreme Court, a copy of which is attached as Appendix C. This appeal was entered within ninety days from the denial of the Motion for Rehearing. The jurisdiction of this Court is pursuant to 28 U.S.C. § 1257(2) and is sustained by the following decisions: *Jenkins v. Georgia,* 418 U.S. 153 (1974); *Miller v. California,* 413 U.S. 15, reh. denied 414 U.S. 881 (1973); *Mishkin v. New York,* 383 U.S. 502, reh. denied 384 U.S. 934 (1966).

Constitutional and Statutory Provisions Involved.

This case involves the First, Sixth and Fourteenth Amendments to the Constitution of the United States.

This case also involves the following state statutes:

New Hampshire Revised Statutes Annotated (1976), which in pertinent part read as follows:

650:1 II: "'Knowledge' means general awareness of the nature of the content of the material."

650:1 IV: "Material is 'obscene' if, considered as a whole, to the average person

(a) when applying the contemporary standards of the county within which the obscenity offense was committed, its predominant appeal is to the prurient interest in sex, that is, an interest in lewdness or lascivious thoughts;

(b) it depicts or describes sexual conduct in a manner so explicit as to be patently offensive; and

(c) it lacks serious literary, artistic, political or scientific value."

650:1 VI: "'Sexual Conduct' means human masturbation, sexual intercourse actual or simulated, normal or perverted, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals, any depiction or representation of excretory functions, any lewd exhibitions of the genitals, flagellation or torture in the context of a sexual relationship. Sexual intercourse is simulated when it depicts explicit sexual intercourse which gives the appearance of the consummation of sexual intercourse, normal or perverted."

650:2 I: Offenses.

"I. A person is guilty of a misdemeanor if he commits obscenity when with knowledge of the nature of content thereof, he:

(a) sells, delivers or provides, or offers or agrees to sell, deliver or provide, any obscene material; or

(b) presents or directs an obscene play, dance or performance, or participates in that portion thereof which makes it obscene; or

(c) publishes, exhibits or otherwise makes available any obscene material; or

(d) possesses any obscene material for purposes of sale or other commercial dissemination; or

(e) sells, advertises or otherwise commercially disseminates material, whether or not obscene, by representing or suggesting that it is obscene."

Questions Presented.

I. Does a definition of *scienter* in an obscenity statute, as construed by the state court, which permits conviction on a finding of "general awareness of the nature" of a publication, without requiring proof of knowledge of the contents or specific awareness of the contents comply with minimum constitutional requirements of *scienter* and due process?

2. Does an information in an obscenity case violate the Fourteenth and Sixth Amendments if it fails to specify the sexual conduct allegedly causing a publication to be obscene, where the definition of such conduct is limited by a state court by striking out portions of the definition as impermissibly overbroad after the information has been brought?

Statement of the Case.

Manchester News Company, Inc., of Bedford, New Hampshire is a corporation engaged in the business of distributing periodicals to local dealerships in New Hampshire. *Penthouse Magazine* is one of the publications which it regularly delivers. Luv Pharmacy, Inc., located in Manchester, New Hampshire, is one of the regular dealers to whom the Appellant distributes publications.

In May or June of 1976, Appellant delivered the July 1976 issue of *Penthouse Magazine* to Luv Pharmacy, along with several other publications. On June 21, 1976 a uniformed officer of the Police Department of the City of Manchester purchased a copy of the July 1976 issue of *Penthouse Magazine* at Luv's Pharmacy.

An indictment was returned by the Grand Jury for the State of New Hampshire against the Appellant, charging it with delivering obscene material to Luv Pharmacy in violation of the State's obscenity statute, N. H. RSA 650:2. The indictment charged that on or about the 10th day of June, 1976, the Appellant "did purposely deliver obscene material to Luv Pharmacy, Inc., in that the said Defendant did distribute the July 1976 issue of Penthouse Magazine to the said Luv Pharmacy, Inc., the Defendant being a corporation." The indictment was entered at the September 1976 Term of the Hillsborough County Superior Court. The Appellant moved to dismiss the indictment on the grounds of its being unconstitutionally vague, its failure to allege *scienter,* and the unconstitutionality, facially and as applied to Appellant, of the statute under which the indictment was drawn.

At a hearing on April 11, 1977 on Appellant's motion, the State substituted an information for the indictment, which information contained the same charge as the indictment with the addition of ". . . with knowledge of the nature of the contents thereof, contrary to RSA 650:2." The information was allowed by the trial court over Appellant's objection, the motion to dimiss being deemed by the court to apply to the information. The trial court heard arguments on the motion on April 11, 1977. On April 19, 1977, the trial court denied Appellant's motion to dismiss and granted it an exception to its ruling. The trial court reserved and transferred to the New Hampshire Supreme Court all questions of law raised by the pleadings, rulings and exceptions granted thereto.

The New Hampshire Supreme Court sustained Appellant's attack upon one portion of the state's obscenity

statute, but rejected Appellant's other objections. Judge Bois, writing for the Court, deleted the following language from the statutory definition of "sexual conduct" which may be obscene: ". . . any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female . . ." The Court found that this language violated the First and Fourteenth Amendments to the United States Constitution and therefore read that language out of the statute.

With regard to the statutory definition of "knowledge" as "general awareness of the nature of the content of the material," the Court relied on this Court's opinions in *Hamling v. United States*, 418 U.S. 87 (1974) and *Mishkin v. New York*, 383 U.S. 502 (1966) in upholding the constitutionality of the above-quoted language. The New Hampshire Court's opinion, however, is ambiguous in that it appears to reject Appellant's contention that some actual knowledge of the contents must be proved as well as awareness of the nature of the contents, while at the same time it seems to equate the two. The Court's opinion further rejected Appellant's argument that an indictment or information in an obscenity case must indicate to the defendant the kinds of sexual conduct depicted in the offending publication which allegedly render it obscene. The case was remanded for further proceedings consistent with the Court's construction of N. H. RSA 650.

On May 5, 1978, Appellant entered a Motion for Rehearing in the New Hampshire Supreme Court, requesting that the Court clarify its construction of the statutory definition of "knowledge." In addition, Appellant raised the issue of the sufficiency of the information in light of the Court's elimination of certain conduct from the statute. The Court denied Appellant's Motion on May 24, 1978.

The Federal Questions Are Substantial.

I. THE STATUTORY DEFINITION OF *Scienter* IN RSA 650:1 II AND THE NEW HAMPSHIRE SUPREME COURT'S CONSTRUCTION OF THAT DEFINITION ARE VAGUE, AMBIGUOUS AND FAIL TO SATISFY THE MINIMUM CONSTITUTIONAL REQUIREMENTS OF *Scienter* AS SET OUT IN *Hamling v. United States*, 418 U.S. 87 (1974).

"The Constitution requires proof of *scienter* to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity." *Mishkin v. New York*, 383 U.S. 502, 511 (1966). While this Court has, since *Mishkin* was decided, labored to remove some of those "inherent" ambiguites (*Miller v. California*, 413 U.S. 15 (1973); *Jenkins v. Georgia*, 418 U.S. 153 (1974)), at least some members of this Court perceive still "the inherent vagueness of the obscenity concept." *Ward v. Illinois*, —— U.S. ——, 45 L.W. 4623 (1977) (Stevens, J., dissenting opinion at ——, 4627).

The persistence of the problem is merely superficially illustrated by the number of cases dealing with the *scienter* requirement set on this Court's docket last term.[1] The majority of these cases attacked the sufficiency of "constructive knowledge" of the "obscene contents" of offending material to support a conviction under an obscenity statute. *Sherwin v. United States*, #77-1196, dealt with "knowledge of sexual orientation" of the material. In contrast, New Hampshire's *scienter* requirement is phrased only in terms of "general awareness of the nature of the content of the material." N. H. RSA 650:1 II. Such a

[1] E.g., *Sewell v. Georgia*, Docket #76-1738; *Robinson v. Georgia*, Docket #77-915; *Teal v. Georgia*, Docket #77-790; *Sherwin v. United States*, Docket #77-1196; *Cargal v. Georgia*, Docket #77-1426; *Ballew v. Georgia*, Docket #77-1425; *International Amusements v. Utah*, Docket #77-383.

definition is vague in the extreme and has not been construed by the state Supreme Court in a manner which eliminates the vagueness problem. To the contrary, the only construction given this statutory provision is that handed down in the instant case. And, instead of clarifying the muddied waters, the Court clouded them further by declaring: "Having a general awareness of the nature of the contents of the material is, in our opinion, the same as being in some manner aware of the character of the material, and having knowledge of the nature, contents, *or* character of the material. It does not make a defendant absolutely liable, but liable only if he is aware of the nature of the material; . . ." (A. 24). (Emphasis added.)

Aside from the obvious tautological approach taken by the state Court, i.e., general awareness of the nature is the same as being aware of the nature, the Court's opinion is confusing as to exactly what the prosecution must establish in the way of "knowledge" in order to convict under the statute. The Court cites and quotes from dicta in this Court's Opinion in *Hamling v. United States, supra* at 123, which indicates that the prosecution must establish knowledge of contents *and* knowledge of the nature of the materials.[2] The opinion of the New Hampshire Court then recites its tautology quoted above, which is intended to answer the question — whether a defendant may be convicted on an obscenity charge without any proof of its knowledge of the *contents* of the publication.

The vagueness problem inherent in the concept of obscenity is made manifest in the New Hampshire *scienter*

[2] The precise issue addressed here, however, was not decided squarely in *Hamling*. Rather, there this Court held that the Constitution did not require proof of knowledge or belief the materials were of an *obscene* nature. *Hamling* itself was briefed and argued on the assumption that the defendants there had knowledge of the contents.

requirement. While knowledge of the "obscene" nature of materials is not required, *Hamling v. United States, supra,* nowhere has this Court explained precisely what *is* required. *Smith v. California,* 361 U.S. 147 (1959), clearly mandates some sort of knowledge, but does not go further in setting guidelines.[3] *Mishkin v. New York,* 383 U.S. 502 (1966) held "awareness of the character of the material" to be sufficient, "character" later being interpreted in *Ginsburg v. New York,* 390 U.S. 629, 644 (1968), as incorporating the "gloss" provided in *People v. Finkelstein,* 9 N.Y. 2d 342, 214 N.Y.S. 2d 363 (1961).[4] *Ginsberg* itself placed this Court's imprimatur on " 'reason to know' or 'a belief or ground for belief which warrants further inspection or inquiry of . . . the character and content . . . .' " *Ginsberg v. New York, supra* at 643. However, nowhere has this Court sanctioned a standard of *scienter* as amorphous as "general awareness of the nature."

Initially, a layman is beset with the problem of the implicit distinction between "general" and "specific" awareness the New Hampshire statute contains. Is "general awareness" the equivalent of knowing that *Playboy* and *Time* magazines deal with different types of materials? That *Playboy* contains nude pictures generally, along with literary and political articles? If such is the case, then every bookseller and drugstore clerk is subject to prosecution under the statute without any proof that he either saw the specific objectionable issue or was put on inquiry notice that it might contain objectionable materials. The

[3] Indeed, this Court has expressly declined to go further. *Smith v. California,* 361 U.S. 147, 154 (1959); *Ginsberg v. New York,* 390 U.S. 629, 644-45 (1968).

[4] A fair reading of *Mishkin* and *Finkelstein scienter* requirements suggests that the "character" and its "gloss" reduce to awareness of the calculatedly filthy nature of the material.

obvious, and intended, result would be the refusal of such people to deal in all materials which could conceivably be found obscene. Non-obscene as well as objectionable publications would disappear from the marketplace, thus nullifying the public's right of access to sexually oriented materials which fall short of the hard-core pornography *Miller v. California*, 413 U.S. 15 (1973) permits the states to suppress. Cf. *Pell v. Procunier*, 417 U.S. 817, 832 (1974); *Smith v. California*, 361 U.S. 147 (1959).

Nor does the New Hampshire Court's opinion solve the dilemma. In fact, Judge Bois interprets the above-quoted excerpt from *Hamling* as equating "nature," "character," *and* "contents." If by this equation the Court intended to construe N.H. RSA 650:1 II as subsuming this Court's approved prior definitions of *scienter*, one is still faced with the Court's apparent rejection of Appellant's argument that some knowledge of the contents of the specific issue of the publication in question is required. In sum, following the New Hampshire Court's construction of the statute, a distributor could be convicted upon proof only of his general appreciation of the general nature or character of the magazine, without any evidence of his awareness of the contents of a specific issue or its character, whether the issue was typical or atypical of the genre.

The statute and the Court's opinion fail to define "nature" and it is unclear from a reading of either as a whole whether the "nature" referred to is the obscene, sexually oriented or something less. Presumably, at the least, it must be the fact that the material contains depictions of explicit sexual conduct. Yet the fact that one issue of a periodical contains such depictions, which may not be "patently offensive," cannot be sufficient to charge

a defendant with knowledge, however defined, that a subsequent issue contains offensive sexual conduct.[5]

The argument that the prosecution could never establish a defendant's knowledge of the content of a specific issue of a publication has been well countered in *Commonwealth v. Thureson*, Mass. Adv. Sh. (1976) 2659, 357 N.E. 2d 750. There the Massachusetts Supreme Judicial Court reaffirmed the constitutional requirement of knowledge of *contents* to sustain a criminal conviction, citing *Hamling v. United States, supra.* However, as the court was careful to point out, the requisite knowledge may be established inferentially or circumstantially, and not necessarily by direct evidence. The same approach was taken in *Hanf v. State of Oklahoma*, 560 P. 2d 207 (Okl. Cr. 1977), in which the court defined *scienter* as ". . . a *specific* awareness of the contents which make the publication obscene . . . ." *Id.* at 210. (Emphasis added.) This is precisely the definition put forth by Appellant, in substance if not in form, and categorically rejected by the New Hampshire Supreme Court.[6]

The statutory definition of "knowledge" and its interpretation by the New Hampshire Court offends against the Due Process Clause of the Fourteenth Amendment as they are impermissibly vague. As this Court explained

[5] Especially is this the case where the sexual conduct which may be found obscene if offensively portrayed is subsequently limited by the Court to exclude the most common forms of erotic pictorial depictions in former issues of the publication.

[6] Other cases also adopted the Massachusetts and Oklahoma approach to the *scienter* problem. See, e.g. *People v. Rode*, 57 Ill. App. 3d 645, 373 N.E. 2d 605 (1978); *Burns v. State*, 512 S.W. 2d 928 (Ark. 1974) (by implication). This approach is not necessarily at odds with the cases permitting convictions on the basis of "constructive knowledge" as that term can be interpreted as doing no more than sanctioning the use of circumstance and inference to imput knowledge to a defendant. See, e.g., *Ballew v. Georgia*, 138 Ga. App. 530, 227 S.E. 2d 65 (1976).

in *Grayned v. City of Rockford,* 408 U.S. 104, 108-109 (1972): ". . . [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolutions on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory enforcement. . . . [W]here a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' "

The statute as construed is vague in that the person of ordinary intelligence, especially a juror called upon to apply the statute, must necessarily guess at its meaning. The statute as construed is constitutionally deficient in failing to require any element of knowledge of contents, whether established by direct or circumstantial evidence, to support a criminal conviction. For these reasons, the statute as construed cannot stand.

II. The Information under Which Appellant Was Charged Is Constitutionally Insufficient, as Violative of the Fourteenth Amendment and the Sixth Amendment, in that It Failed to Inform Appellant of the Cause and Nature of the Charge Against It.

"[T]he First Amendment requires that procedures be incorporated that 'ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line.' " *Blount v. Rizzi,* 400 U.S. 410, 416 (1971). The requirement that a defendant be fully informed of the nature and cause of the charge against him, like the notice required to comply with guarantees of due process, can be seen as a procedural matter. And it has been argued that the First Amendment itself is the source of procedural due process

rights. Henry P. Monaghan, "First Amendment 'Due Process'," 83 *Harvard L. Rev.* 518 (1970).

This Court's decision in *Miller v. California,* 413 U.S. 15 (1973), setting out a definition of "obscenity" which requires state law to specifically define sexual conduct subject to regulation, contains an element of this due process notion of notice. One of the purposes hoped to be achieved through the redefinition of "obscenity" there put forth was to ensure that " . . . no one will be *subject to prosecution* for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed." *Id.* at 27 (emphasis added). This objective was reaffirmed in *Jenkins v. Georgia,* 418 U.S. 153, 160 (1974).

As this Court has noted in another context, "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions." *N.A.A.C.P. v. Button,* 371 U.S. 415, 433 (1963). Cf. *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975). In the case of obscenity regulation, the initiation of prosecutions and forcing parties to defend against ill-founded charges may themselves prove so burdensome on publishers and distributors that dealing in protected expression will be foreborn to avoid such hardships. The public, as always in the First Amendment area, will be the loser.

To avoid such "informal prior restraints" and that unwanted circumscription of the area of protected speech, this Court decided *Miller.* However, the broad promise *Miller* made cannot be effectuated if, as in this case, a defendant may be drawn into court and forced to defend a publication without first being told the basis of the charge. Since *Miller* and *Jenkins* make clear that only certain kinds of sexual conduct may be subject to a charge of ob-

scenity, it necessarily follows that a defendant should be informed as to what type of sexual conduct is allegedly offensively depicted in his publication.

The burden on a prosecutor of so specifying should be slight, since presumably his examination of the publication involves comparing the depictions contained therein with the specific definitions set out in the regulating statute. The benefit to the defendant from such a statement in the charge is great as then the prosecution involves only those indicated representations and makes less likely Justice Stevens' observation that "[i]n the final analysis, the guilt or innocence of a criminal defendant in an obscenity trial is determined primarily by individual jurors' subjective reactions to the materials in question rather than by the predictable application of rules of law." *Smith v. United States,* —— U.S. ——, 45 L.W. 4495, 4501 (1977) (Dissenting opinion).

Since "[t]he type of conduct depicted must fall within the substantive limitations suggested in *Miller* and adopted in *Hamling* . . ." (id. at ——, 4499) to ensure that that is in fact the basis of an obscenity prosecution, such conduct must be delineated in the charge. To prosecute on the basis of an information as vague as that in the instant case *a fortiori* allows juries to convict upon their subjective reactions to features of the publication which are constitutionally protected but may offend. The defendant is then forced to pursue his course in the appellate courts, overburdened already with such cases. Judicial economy and fairness to defendants mandate more specificity.

Judicial economy would be served by permitting dismissals of those charges unsupported in fact by reference to specifically defined sexual conduct. Issues for trial would be narrowed and notice of the precise nature of the charges would be available to defendants.

In *Hamling v. United States,* 418 U.S. 87, 117 (1974), this Court stated: "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.' " This Court also there held that since "[t]he legal definition of obscenity does not change with each indictment; it is a term sufficiently definite in legal meaning to give a defendant notice of the charge against him," an indictment need not allege the component parts of the definition. *Id.* at 118-119. This rationale is manifestly inapplicable in the instant case.

Rather, Appellant was initially charged under N. H. RSA 650:2, which subsumed the definition of "sexual conduct" as set out in N. H. RSA 650:1 VI. On appeal brought by this Appellant, the New Hampshire Supreme Court struck out of the statute some kinds of conduct which the Court stated could not be proscribed consistently with *Miller.* The case was thus remanded for trial under the narrowed definition.

However, since the Appellant had no indication of the kind of conduct which was the basis of the original indictment, it is now without any indication as to whether the present charges are based on protected or unprotected expression. In rejecting Appellant's argument with respect to the sufficiency of the indictment, the New Hampshire Court relied on this Court's statement in *Hamling* that "obscene" is a static, unchanging legal concept. The New Hampshire Court then proceeded to change that concept and Appellant is still left in the dark as to the conduct allegedly causing the publication to be obscene.

Moreover, while the definition of obscenity is not a factual question but a legal one, *Hamling, supra* at 118, it de-

pends for its validity upon factual determinations, one of which is the presence of the proscribed sexual conduct.

The Appellant here was charged under a statute subsequently found to be overinclusive. Since the information did not specify the kinds of conduct involved, Appellant has no means of ascertaining whether it is being prosecuted pursuant to an information based on protected conduct. As Mr. Justice Stevens recently said: "One of the strongest arguments against regulating obscenity through criminal law is the inherent vagueness of the obscenity concept. The specificity requirement as described in *Miller* held out the promise of a principled effort to respond to that argument." *Ward v. Illinois,* —— U.S. ——, 45 L.W. 4623, 4627 (1977). To require Appellant to defend against charges which may have changed, and when he has no means of ascertaining the changes, goes far to compounding the vagueness problem with obscenity. Moreover, it obscures the rigorous procedural requirements of notice and "adequate bulwarks" emanating from the First Amendment. *Speiser v. Randall,* 357 U.S. 513 (1958); *Blount v. Rizzi,* 400 U.S. 410 (1971).

Conclusion.

For the reasons stated above, jurisdiction should be noted.

Respectfully submitted,

W. MICHAEL DUNN, ESQUIRE,
DOROTHY M. BICKFORD, ESQUIRE,
SHEEHAN, PHINNEY, BASS &
GREEN, P.A.,
1000 Elm street,
Manchester, New Hampshire.
(603) 668-0300
Attorneys for the Appellant.

Appendix A.

Hillsborough
No. 7894

THE STATE OF NEW HAMPSHIRE
v.
MANCHESTER NEWS COMPANY, INC.

April 25, 1978

David H. Souter, attorney general, *Mr. Richard B. Michaud,* attorney (*Peter L. Heed,* assistant attorney general, orally), for the State.

Sheehan, Phinney, Bass & Green P.A., of Manchester (*W. Michael Dunn* orally), for the defendant.

BOIS, J. Manchester News Company, Inc., of Bedford, New Hampshire, is a corporation engaged in the business of distributing periodicals to local dealerships in New Hampshire. In September 1976, an indictment was returned by the grand jury alleging that the defendant delivered the July 1976 issue of *Penthouse* to LUV Pharmacy, Inc. and that this issue of *Penthouse* was obscene. The defendant moved to dismiss the indictment on various grounds, including the ground that no criminal knowledge on the part of the defendant was alleged. The State subsequently substituted an information for the indictment, charging the defendant with the same offense and adding the language "with knowledge of the nature of the contents [of the magazine], con-

trary to RSA 650:2 . . . ." The information was allowed by the court over defendant's objection and the motion to dismiss was deemed by the court to be applicable to the information.

After arguments on the defendant's motion to dismiss, the Suprerior Court (*Keller*, J.) denied the motion. All questions of law raised by the pleadings, rulings, and exceptions were reserved and transferred.

The defendant raises three issues: (1) whether the information describes the alleged offense with sufficient definiteness, (2) whether RSA ch. 650 (Supp. 1976) violates the United States Constitution, and (3) whether the legislature intended this type of defendant to be prosecuted under RSA ch. 650 (Supp. 1976).

I. The Indictment Issue

In order to be guilty of distributing obscene material under RSA 650:2 (Supp. 1976), a defendant need not have had knowledge that the material was obscene, but must be shown to have had knowledge of the nature of the contents thereof. *Hamling v. United States,* 418 U.S. 87 (1974). The defendant contends that the information defectively alleges the knowledge element of the offense because it does not specify how or when the defendant received knowledge of the contents of the July 1976 issue of *Penthouse,* or which agent of the corporation possessed the requisite knowledge. This, the defendant claims, is a violation of part I, article 15 of the New Hampshire Constitution, which provides: "No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him . . . ."

An indictment or information "must inform the defendant of the offense for which he is charged with sufficient specificity so that he knows what he must be prepared to

meet and so that he is protected from being twice put in jeopardy." *State v. Bean,* 117 N.H. , , 371 A.2d 1152, 1154 (1977); *State v. Inselburg,* 114 N.H. 824, 827, 330 A.2d 457, 459 (1974). An indictment or information will generally give sufficient notice to the defendant of a statutory offense when the charge follows the language of the statute and alleges all the necessary elements of the offense with sufficient specificity. *Hamling v. United States,* 418 U.S. 87, 117-18 (1974); *State v. Bean supra; State v. Inselburg, supra;* 2 Wharton, Criminal Procedure § 289 (12th ed. 1975). Every fact the State intends to prove, however, does not have to be pleaded in the information. The test is not whether the information could be more comprehensive and certain. To the contrary, the information need contain only the elements of the offense and enough facts to warn the accused of the specific charges against him. The information in this case sufficiently apprised the defendant that he was being charged with having knowledge of the contents of a certain magazine. It was not necessary for the State to allege how or when the defendant acquired this knowledge.

It was also not necessary for the information to state which agent of the corporate defendant possessed knowledge of the magazine's contents. An information charging a corporation with an offense need not indicate for whose acts the corporation is being charged. *See United States v. Van Allen,* 28 F.R.D. 329 (1961 S.D.N.Y.); *United States v. Detroit Sheet Metal & Roofing C. Ass'n,* 116 F. Supp. 81 (E.D. Mich. 1953); *State v. Oregon City Elks Lodge No. 1189, BPO Elks,* 17 Or. App. 124, 520 P.2d 900 (1974).

The defendant's second challenge to the sufficiency of the information concerns the use of the phrase "obscene material." The defendant would have the State allege exactly why the magazine is obscene. It contends that the information should allege facts from which the obscenity of the

magazine in issue could be found. This argument was considered by the United States Supreme Court in *Hamling v. United States*, 418 U.S. 87 (1974). In *Hamling* the defendants were charged, inter alia, with mailing obscene material in violation of 18 U.S.C. § 1461. The Court recognized that the definition of obscenity is not a question of fact, but one of law. The word "obscene" is not merely a descriptive term, but a legal term of art. The legal definition of obscenity does not change with each indictment; it is a term "sufficiently definite in legal meaning to give a defendant notice of the charge against him." *Hamling v. United States*, 418 U.S. at 118; *see Roth v. United States*, 354 U.S. 476 (1957). Because obscenity is sufficiently definite in legal meaning to give a defendant notice of the charge against him, no facts have to be alleged in the indictment or information that would support a finding of obscenity. We therefore hold that the information in this case is sufficient to inform the defendant of the charge against it.

II. The Obscenity Statute Issue

A.

The thrust of defendant's argument concerning the constitutionality of the New Hampshire obscenity statute, RSA ch. 650 (Supp. 1976), is that it regulates expression protected under the United States Supreme Court decision in *Miller v. California*, 413 U.S. 15 (1973).

The United States Supreme Court in *Miller v. California supra* established the basic guidelines for distinguishing between material protected by the first and fourteenth amendments, and unprotected obscene material. The oft-repeated three-prong test of *Miller* is:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . .

> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
> (c) whether the work, taken as a whole lacks serious literary, artistic, political, or scientific value. *Id.* at 24.

The Court attempted to establish a test for isolating descriptions or depictions of patently offensive hard-core sexual conduct. *Miller v. California, supra* at 27; *see State v. Harding*, 114 N.H. 335, 339, 320 A.2d 646, 649 (1974). The State must specifically define or describe the sexual conduct which it wishes to regulate in order to "provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." *Miller v. California, id.* at 27. The Court also intended to place a limitation on the types of sexual conduct a State may regulate. While not limiting States to these examples, the Court said that "(a) [p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated . . . [and] (b) [p]atently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibitions of the genitals" were the types of hard-core sexual conduct which the States could regulate. *Miller v. California, supra* at 25.

Cases after *Miller* make it clear that part (b) of the *Miller* test and the examples given by the Court were intended to be a substantive limitation on the sexual conduct a State may list in its statute. In *Jenkins v. Georgia*, 418 U.S. 153, 160-61 (1974), the Court said that the examples given in *Miller* were "certainly intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a determination [of obscenity]. It would be wholly at odds with this aspect of *Miller* to uphold an obscenity conviction based upon a defendant's depiction of a woman with a bare midriff, even

though a properly charged jury unanimously agreed on a verdict of guilty." The Court reiterated this position in *Hamling v. United States,* 418 U.S. 87, 114 (1974): "*Miller* . . . was speaking in terms of substantive constitutional law of the First and Fourteenth Amendments. . . . [T]here is a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is 'patently offensive' within the meaning of the obscenity test set forth in the *Miller* cases." The Court has referred to this substantive limitation in recent obscenity opinions. *See Ward v. Illinois,* 431 U.S. 767 (1977); *Smith v. United States,* 431 U.S. 291 (1977).

The question therefore becomes whether the legislature exceeded this substantive constitutional limitation in RSA 650:1 VI (Supp. 1976). This section defines sexual conduct as:

> [H]uman masturbation, sexual intercourse actual or simulated, normal or perverted, *or any touching of the genitals, public areas or buttocks of the human male or female, or the breasts of the female,* whether alone or between members of the same or opposite sex or between humans and animals, any depiction or representation of excretory functions, any lewd exhibitions of the genitals, flagellation or torture in the context of a sexual relationship . . . . (Emphasis added).

It is the emphasized portion of the above statute which is troublesome. The kinds of sexual conduct therein specified by the legislature are certainly not as tame as the bare midriff example of Mr. Justice Rehnquist in *Jenkins v. Georgia,* 418 U.S. 153, 161 (1974). However, they are certainly not as "hard core" as the examples given in *Miller* and emphasized in *Jenkins* and *Hamling,* or the categories of sexual conduct we enumerated in *State v. Harding,* 114

N.H. 335, 341, 320 A.2d 646, 651 (1974). Such a broad sweep by the legislature can create a chilling effect on protected expression, which is what the *Miller* court wanted to avoid.

We must therefore hold the above-emphasized portion of RSA 650:1 VI (Supp. 1976) as violative of the first and fourteenth amendments of the United States Constitution, and those listed sexual activities must be read out of that section.

B.

Defendant also attacks the statute on the ground that it does not specify the requisite scienter for a conviction. RSA 650:2 (Supp. 1976) (amended by Laws 1977, 199:2) requires that the defendant deliver the obscene material with knowledge of the nature of the contents, and RSA 650:1 II (Supp. 1976) defines knowledge as a "general awareness of the nature of the content of the material." The defendant claims this is defective under *Hamling v. United States,* 418 U.S. 87 (1974), because it does not require *specific* knowledge of the contents of the material.

Defendant cannot seriously be contending that the distributor of an obscene magazine must be shown to have known of every detail of the magazine before he may be convicted. On the other hand, no one can contend that a distributor may be convicted without any requirement of scienter. *Smith v. California,* 361 U.S. 147 (1959). The amorphous area between these extremes is at issue, but to us this issue is more of semantics than substance.

In *Mishkin v. State of New York,* 383 U.S. 502 (1966), the United States Supreme Court validated the New York Court of Appeals' interpretation that its statute requires the defendant to be "in some manner aware of the character of the material." The Supreme Court made reference to *Mishkin* in *Hamling,* in which it upheld the trial court's jury

instruction that defendant needed to have "knowledge of the character of the materials." The Court said that "[i]t is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." *Hamling v. United States, supra* at 123. In light of the definitions of scienter to which the Supreme Court has given approval, we cannot say RSA 650:1 II (Supp. 1976) is unconstitutional. Having a general awareness of the nature of the contents of the material is, in our opinion, the same as being in some manner aware of the character of the material, and having knowledge of the nature, contents, or character of the material. It does not make a defendant absolutely liable, but liable only if he is aware of the nature of the material; the statute is therefore constitutional.

III. The Legislative Intent Issue

The defendant claims that the prosecution of a distributor corporation is contrary to the following expression of legislative intent:

> It is the express intent of the general court that . . . RSA 650 . . . apply only to those persons actually responsible for the production and dissemination of pornographic or obscene materials. Laws 1976, 46.6.

The defendant theorizes that the legislature intended the statute to apply only to the producer of the material, and not to the mere distributor of obscene material. We cannot agree with the defendant.

The language of RSA 650:2 (Supp. 1976) (amended by Laws 1977, 199:2) manifests the legislature's intent to attach criminal liability to more than just the person or corporation responsible for the decision to produce the

obscene material. The legislature clearly intended to include those individuals and corporations in the chain of distribution. This is indicated by the language of RSA 650:2 (Supp. 1976): "[S]ells, delivers or provides, or offers or agrees to sell, deliver or provide, . . . otherwise makes available any obscene material; . . . possesses any obscene material for the purpose of sale or other commercial dissemination . . . ." RSA 650:1 I (Supp. 1976) includes in the definition of "disseminate" the terms "distribute" and "sell." The legislature would not have used this language if it intended to exclude distributors of obscene material. We hold that the defendant is within the scope of the statute.

We therefore remand for further proceedings consistent with our construction of RSA ch. 650 (Supp. 1976).

Exceptions sustained in part; remanded.

LAMPRON, J., did not sit; the others concurred.

Appendix B.

STATE OF NEW HAMPSHIRE
HILLSBOROUGH, SS. SEPTEMBER TERM, 1977

SUPREME COURT

No. 7894

State of New Hampshire
v.
Manchester News Company, Inc.

MOTION FOR REHEARING

NOW COMES the defendant, Manchester News Company, Inc. and respectfully requests that this Court grant a rehearing in the above-captioned matter for the following reasons:

1. The Court's Opinion, dated April 25, 1978, in Part I states the defendant's challenge to the sufficiency of the information as being based on the failure of the State to allege "why" the magazine is obscene. Defendant's argument, however, was directed to "what" in the magazine was obscene. In light of this Court's decision concerning RSA 650:1 VI, and in light of the United States Supreme Court's reading of *Miller v. California,* 413 US 15 (1973) in *Hamling v. United States,* 418 US 87 (1974), the information must allege the "hard-core" sexual conduct contained in the magazine which makes it offensive. Although *Hamling,* supra, held that "the various component parts of the constitutional definition of obscenity need not be alleged in the indictment in order to establish its sufficiency", the precise question now before this Court was not addressed. If the "sexual conduct", which

must be defined by the State's statute so as to come within the *Miller* guidelines, need not be stated in the indictment or information, then a defendant in an obscenity case is without knowledge as to what it should be prepared to meet at trial. *State v. Inselburg,* 114, NH 134, 136 (1937). Without such a statement of the offensive conduct, the Supreme Court's objective in *Miller,* i.e. "to assure that no one will be *subject to prosecution* for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard-core' sexual conduct" will be undermined. *Miller v. California,* supra at 27.

2. The Court in its opinion in this case, Part II, B. upheld the definition of "knowledge" contained in RSA 650:1 II. However, the Court's interpretation and construction of the knowledge requirement as there defined is unconstitutionally vague, in violation of the First and Fourteenth Amendments to the United States Constitution. While the Court cites *Hamling,* supra at 123 with apparent approval, to the effect that constitutional requirements are satisfied if the prosecution shows that the defendant had knowledge of the contents of the materials *and* knew the character and nature of those materials, it is unclear whether the Court is equating such knowledge with "general awareness of the nature of the content of the material." That is, it is unclear whether the prosecution under our statute must prove knowledge of the contents as well as knowledge of the nature of the materials.

3. The Court in its opinion eliminated certain conduct from the definition of sexual conduct contained in RSA 650:1 VI. However, the information against defendant was based on the expanded definition of impermissible sexual conduct. Since the information did not allege the kind of sexual conduct on which it was based, it cannot be known whether the original indictment and the subse-

quent information were grounded upon the kind of sexual conduct which this Court has found constitutionally protected. It is precisely this kind of "chilling effect" on protected expression through vaguely drawn indictments which force publishers and distributors to defend against unknown charges that *Miller v. California* sought to avoid. Since it cannot be known whether or not the present charges against this defendant were based on protected or unprotected expression, the information should be dismissed.

WHEREFORE, Defendant respectfully requests that this Court grant a rehearing in this matter to definitely and finally resolve some possible ambiguities in its Opinion dated April 25, 1978 and that after such rehearing this Court take further action as follows:

A. That the information against Defendant be dismissed for failure to state the "sexual conduct" allegedly obscene, in accordance with the stated objectives of *Miller v. California;*

B. That the information be dismissed for failure of the statute RSA 650 to comport with constitutional requirements of scienter;

C. That the information be dismissed since it is unascertainable whether it was issued pursuant to that part of RSA 650 which this Court struck out; and

D. For such further relief as may be just.

Respectfully submitted,
Manchester News Company, Inc.
By Its Attorneys
SHEEHAN, PHINNEY, BASS & GREEN
Dorothy M. Bickford

Date: May 5, 1978

I hereby certify that a copy of the within Motion was this day mailed to Thomas Rath, Attorney General, opposing counsel.

Appendix C.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

THE STATE OF NEW HAMPSHIRE
Respondent
v.
MANCHESTER NEWS COMPANY, INC.
Appellant

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Manchester News Company, Inc., the Appellant above-named, hereby appeals to the Supreme Court of the United States from the judgment of the New Hampshire Supreme Court, Parts I and IIB, entered herein on April 25, 1978, and the final order of the New Hampshire Supreme Court denying the Appellant's Motion for Rehearing entered May 24, 1978.

This appeal is taken pursuant to 28 U.S.C., § 1257(2) (1970).

Respectfully submitted,
Manchester News Company, Inc.
By Its Attorneys,
SHEEHAN, PHINNEY, BASS & GREEN
PROF. ASS'n
By:
W. Michael Dunn, Esquire

I hereby certify that on the day of July, 1978, a copy of the foregoing was sent by 1st class mail, postage prepaid,

to Thomas D. Rath, Attorney General for the State of New Hampshire, and Richard M. Michaud, Esquire, Office of the Attorney General, opposing counsel.

W. Michael Dunn, Esquire